U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-, PLLC

DATE: OCT. 5, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of business intelligence (BI) technology consulting services, seeks to permanently employ the Beneficiary as a senior BI developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. §1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

On July 17, 2015, the Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the educational requirements for the requested classification.

The matter is now before us on appeal. The Petitioner asserts that the Director misinterpreted the law and abused his discretion by "inventing novel criterion" to establish that the Beneficiary's master's degree does not qualify as an advanced degree. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is October 13, 2014.[1]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in Computer Science, Business, Electrical/Electronics Engineering, CIS, MIS, or a related field.
H.5. Training: None required.
H.6. Experience in the job offered: 6 months in the proffered job.

[1] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

H.7. Alternate field of study: Computer Science, Business, Electrical/Electronics Engineering, CIS, MIS, or a related field.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 6 months as a programmer analyst or related experience.
H.14. Specific skills or other requirements: Prior experience with Microstrategy, Teradata, and Oracle required. Will accept any suitable combination of education, training, or experience as per the requirements contained in items H.4. through H.14. Please note that the major field of study: Computer Science, Business, Electrical/Electronics Engineering, CIS, MIS, or a related field.

Part J of the labor certification states that the beneficiary possesses a master of business administration degree (MBA) from in California, completed in 2011. The record contains a copy of the beneficiary's MBA diploma and transcript from The diploma is dated December 31, 2011. The record also contains the Beneficiary's bachelor of technology degree in computer science and engineering issued by in India on March 29, 2008, together with a transcript.

II. LAW AND ANALYSIS

A. USCIS' Role in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, a foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving the accompanying ETA Form 9089 in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of senior Java developer II. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

In these proceedings, we must decide whether the Beneficiary meets the requirements of the offered position as certified by the DOL. We must also determine the eligibility of the Petitioner and the Beneficiary for the requested classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Record Does Not Establish the Beneficiary's Qualifications for the Requested Classification

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the Petitioner requests the Beneficiary's classification as an advanced degree professional in the offered position of senior BI developer based on the Beneficiary's possession of an MBA issued by

The record indicates that, at the time issued the Beneficiary's MBA on December 31, 2011, the school was not fully accredited. As noted by the Director in his decision, was pre-accredited on June 24, 2011, but did not receive full accreditation until February 22, 2013.

While the regulatory language of 8 C.F.R. § 204.5(k)(2) does not specifically state that a degree must come from an accredited college or university to qualify as an "advanced degree," the requirement is implicit in the regulation. As noted by the Director in his decision, the Act is a federal statute with nationwide application. The regulations implementing the Act, including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act, as well as 8 C.F.R. § 204.5(l)(2) defining "professional" for the purposes of section 203(b)(3) of the Act, also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States academic or professional degree** . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States baccalaureate degree**" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States doctorate**" (or a foreign equivalent degree) (emphasis added). Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States baccalaureate degree**" (or a foreign equivalent degree) (emphasis added). The repeated modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rule makers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for an educational institution to secure accreditation by a regional accrediting agency[2] approved by the U.S. Department of Education (DOE) and Council for Higher Education Accreditation (CHEA). *See Yau v. INS*, 13 I&N Dec. 75 (Reg'l Comm'r 1968) (a degree issued by an unaccredited institution does not qualify as a professional within the statute granting preference classification.).

Accreditation is the process of conducting nongovernmental, peer evaluation of educational institutions and programs to ensure that educational institutions or programs are operating at basic

[2] Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria. Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.

levels of quality and provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees. *See* DOE, *Accreditation in the United States*, http://www2.ed.gov/print/admins/finaid/accred/accreditation.html (last visited Sept. 30, 2016). The DOE is required by law to publish a list of nationally recognized accrediting agencies that are reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. The DOE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. *Id.*

The CHEA is an association of 3,000 degree-granting colleges and universities that accredits higher education institutions as a key strategy to assure quality, accountability, and improvement in higher education. *See* CHEA, *Recognition of Accrediting Organizations Policy and Procedures*, www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed Sept. 30, 2016). According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort." *Id.* The CHEA also recognizes accrediting organizations.

The DOE and CHEA recognize WASC Senior College and University Commission (WSCUC) as the accrediting association with jurisdiction over California, where [redacted] is located.[3] As previously noted, WSCUC's granted candidacy to [redacted] on June 24, 2011, and granted full accreditation [redacted] on February 22, 2013.[4] [redacted] issued the Beneficiary's MBA on December 31, 2011, prior to its full accreditation.

According to WSCUC's website, candidacy (pre-accreditation) is a "status of preliminary affiliation with [WSCUC], awarded to institutions for a limited period following a specified procedure for institutional self-study and on-site evaluation. Candidacy is subject to renewal. Candidacy is not accreditation and does not assure eventual accreditation. It is an indication that an institution is progressing toward accreditation."[5] To obtain candidacy, the institution must demonstrate that it meets all, or nearly all, of WSCUC's standards of accreditation a minimum level and has a clear plan in place to meet the standards at a substantial level of compliance for accreditation.[6] Candidacy is limited to 5 years and is granted only when an institution can demonstrate that it is likely to become accredited during the 5-year period.[7] Initial (full) accreditation is granted when the institution has met WSCUC's standards of accreditation at a substantial level.

---

[3] *See* CHEA Directories, at http://www.chea.org/Directories/regional.asp (last visited Sept. 30, 2016).

[4] *See* WSCUC, at https://www.wascsenior.org/institutions [redacted] (last visited Sept. 30, 2016).

[5] WSCUC, at https://www.wascsenior.org/directory/legend (last visited Sept. 30, 2016).

[6] WSCUC, at https://www.wascsenior.org/resources/handbook-accreditation-2013/part-iv-commission-decisions-institutions/forms-possible-commission-action (last visited Sept. 30, 2016).

[7] WSCUC, at https://www.WASCsenior.org/resources/handbook-accreditation-2013/part-iv-commission-decisions-institutions/forms-possible-commission-action (last visited Sept. 30, 2016).

While [redacted] is approved to operate in California by the Bureau for Private Postsecondary Education (BPPE), the fact remains that it was not a fully accredited institution at the time the Beneficiary's degree was issued. The State of California acknowledges that "accreditation is an indication of the quality of education offered," and that institutions "must be accredited by an agency recognized by the [DOE] in order for it or its students to receive federal funds." CA.gov Postsecondary Ed. Commission, http://www.cpec.ca.gov/x_collegeguide_old/accreditation.asp (last visited Sept. 30, 2016). California's Education Code states that approval to operate in California is granted after the BPPE has verified that the institution "has the capacity to satisfy the minimum operating standards." Cal. Ed. Code section 94887.

Therefore, since the beneficiary's MBA from [redacted] was not issued by a fully-accredited institution of higher education, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

The Petitioner urges us to adopt the DOE's definition of an "institution of higher education." *See* 20 U.S.C. § 1001(a). Under that definition, an institution of higher education may include an unaccredited school if a recognized accreditation agency granted it "preaccreditation status" and the DOE "determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time." 20 U.S.C. § 1001(a)(5). The record indicates that [redacted] received preaccreditation status (candidacy) from WSCUC on June 24, 2011, about 6 months before issuing the Beneficiary's degree.

The DOE's definition of an institution of higher education is part of the Higher Education Act of 1965, Pub. L. No. 89-329 (HEA). HEA's definition of an institution of higher education is for the purpose of providing financial assistance for students in postsecondary and higher education and does not relate to the accreditation requirements of the DOE and CHEA discussed above. *See* Higher Ed. Act of 1965, Pub.L. 89–329. Status under the HEA as an institution of higher education has no bearing on whether a degree issued by [redacted] meets the requirements of section 203(b)(2) of the Act.

The Petitioner asserts that we erroneously require the issuance of U.S. advanced degrees by accredited schools. The Petitioner states that USCIS "misinterpreted the law and abused [our] discretion by including and applying language in the regulations with no legal basis in the face of [the Petitioner's] credible interpretations."

But an administrative agency's interpretation of its own regulations need not be the only, or even the best, interpretation. *Decker v. Nw. Envtl. Def. Ctr.*, -- U.S. --, 133 S.Ct. 1326, 1337 (2013). Unless plainly erroneous or inconsistent with the regulation, an agency's interpretation controls. *Id.*

In the instant case, our interpretation requiring the issuance of U.S. advanced degrees by accredited schools is neither plainly erroneous nor inconsistent with the regulations. We therefore reject the Petitioner's assertion that we have misinterpreted the regulations and abused our discretion.

For the reasons explained above, the Petitioner has not established that the Beneficiary possesses a master's degree from an accredited institution. The record does not establish the Beneficiary's possession of the educational requirements for the requested classification. We will therefore affirm the Director's decision and dismiss the appeal.

C. The Petitioner Did Not Demonstrate its Ability to Pay the Proffered Wage

Although not addressed in the Director's decision, the record also does not establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the labor certification states the proffered wage of the offered position of senior BI developer as $75,629 per year.

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between any wages paid and the annual proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[8]

The instant record closed before the Director on July 6, 2015, with his receipt of the Petitioner's response to his notice of intent to dismiss. At that time, required evidence of the Petitioner's ability to pay the proffered wage in 2015 was not yet available.[9] We will therefore consider the Petitioner's ability to pay only in 2014.

The record establishes the Petitioner's ability to pay the individual proffered wage in 2014. An IRS Form W-2, Wage and Tax Statement, documents the Petitioner's payment to the Beneficiary that

[8] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[9] According to the Florida Department of State, Division of Corporation's website, the Petitioner changed its name on May 2, 2016, from [redacted] to [redacted] *See* http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=[redacted] (last visited Sept. 30, 2016).

year of $72,199.27, just $3429.73 below the annual proffered wage. A copy of the Petitioner's federal income tax return for 2014 reflects net income exceeding the difference between the wages paid and the proffered wage. But USCIS records indicate the Petitioner's filing of four Forms I-140, Immigrant Petitions for Alien Workers, for other beneficiaries that remained pending after the instant petition's priority date.[10]

A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our petition denial where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The record does not document the priority dates or proffered wages of the Petitioner's other pending petitions, or whether it paid any wages to those beneficiaries. The record also does not indicate whether any of the other petitions were withdrawn, revoked, or denied, or whether any of those beneficiaries obtained lawful permanent residence. Without this information, the record does not establish the Petitioner's ability to pay the proffered wage. In any future filings in this matter, the Petitioner must demonstrate its ability to pay the combined proffered wages.

As previously indicated, we may also consider evidence of a petitioner's ability to pay a proffered wage beyond its net income and net current assets. *See Sonegawa*, 12 I&N Dec. at 614-15. We may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; and other evidence of ability to pay.

The instant record indicates the Petitioner's continuous business operations since 2010. On the Form I-140, the Petitioner stated its employment of 86 people. But the record does not document growth in the Petitioner's business. Unlike in *Sonegawa*, the record also does not indicate the Petitioner's possession of an outstanding reputation in its industry or the occurrence of any uncharacteristic business expenses or losses. In addition, unlike the petitioner in *Sonegawa*, the Petitioner must demonstrate its ability to pay multiple beneficiaries. Thus, the totality of the circumstances in this case does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

The Petitioner did not demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. For this additional reason, we will dismiss the appeal.

[10] USCIS records identify the other petitions by the following receipt numbers: [redacted] and [redacted]

III. CONCLUSION

The record does not establish the Beneficiary's possession of the educational requirements for the requested classification of advanced degree professional. The record also does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

The petition will remain denied for the reasons discussed above, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of P-S-, PLLC*, ID# 123631 (AAO Oct. 5, 2016)